

# ICSID and the Calvo Clause a Hindrance to Foreign Direct Investment in LDCs

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## I. INTRODUCTION

The International Centre for Settlement of Investment Disputes (hereinafter ICSID) was created in 1966 as a forum for settling contract disputes involving a foreign investor and a host state government.<sup>1</sup> The number of agreements of this nature has increased during the past several years, especially as foreign investment has increased in less-developed countries (LDCs) or in newly industrialized countries (NICs). ICSID utilizes arbitration and conciliation in settling these disputes and thereby provides an effective alternative to local court proceedings in those countries that have become ICSID signatories.<sup>2</sup> Likewise, the availability of this agency's services represents an important tool for encouraging foreign investment in LDCs. While more than 90 nations have become signatories of ICSID, very few Latin American countries are signatories.<sup>3</sup> As a result, many Latin American countries, which could greatly benefit from foreign investment, do not avail themselves of ICSID's services which substantially encourage foreign investment. A primary reason for their reluctance to join ICSID may be attributed to the widespread adoption of the Calvo doctrine of law and the inclusion of "Calvo clauses"<sup>4</sup> in most Latin American investment contracts. Briefly stated the Calvo doctrine requires that legal disputes involving foreigners doing business in a country which recognizes this doctrine be resolved by local remedies rather than by international legal remedies. Although the

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1. Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, *opened for signature* Mar. 18, 1965, 17 U.S.T. 1270, T.I.A.S. No. 6090, 575 U.N.T.S. 159, (*entered into force* Oct. 14, 1966), *reprinted in* 4 T.L.M. 532 (1965) [hereinafter ICSID Convention].

2. *Id.*

3. *Disputes before the Centre*, INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES, TWENTY-FIRST ANNUAL REPORT 6-7 (1988) [hereinafter ICSID, 21ST ANN. REP.]; *see also* Amerasinghe, *The International Centre for Settlement of Investment Disputes and Development Through the Multinational Corporation*, 9 VAND. J. TRANSNAT'L L. 793, 798 (1976).

4. *Infra* notes 49-61 and accompanying text.

creators of ICSID advocated the application of international legal remedies, they also saw certain attributes associated with the Calvo doctrine. This recognition led to the incorporation of a modified version of the Latin American Calvo clause into Article 27 of the Convention on Settlement of Investment Disputes Between States and Nationals of Other States [hereinafter "ICSID Convention"], the convention that established ICSID.<sup>5</sup>

This Article begins with a discussion of ICSID, examining its creation, jurisdiction, operations, and problems. This discussion is followed by an in-depth examination of the Calvo doctrine and Calvo clauses, tracing their development and scope of applicability. Finally, the legal interaction between Calvo clauses and ICSID provisions is examined in an attempt to identify the conflicting concepts and to make recommendations for effectively reconciling them.

## II. THE GENESIS OF ICSID

The globalization of business operations and the need to finance foreign direct investment in plant and equipment have resulted in a large flow of funds across national borders. Most international business ventures involve contractual agreements between foreign investors and local individuals, business firms, or financial institutions. In most of these ventures, the parties involved are private business firms or individuals.<sup>6</sup>

Investment disputes often arise in these contractual relationships. Because most of the disputes occur between private parties, they are settled by a variety of traditional means, ranging from court proceedings to amicable settlements. A private dispute settlement organization, the most prominent of which are the American Arbitration Association, Japan Arbitration Association, Korean Arbitration Association, and the International Chamber of Commerce, is often utilized to settle the dispute.

A narrow but growing area of foreign investment disputes involves contracts between foreign private investors and host state governments. The number of agreements of this nature has been increasing during the past several years, especially as foreign investment has increased in LDCs or in NICs.<sup>7</sup>

ICSID was created as a result of the international community's concern that "the inadequacy of arrangements for dealing with investment

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5. ICSID Convention, *supra* note 1, at art. 27.

6. Amerasinghe, *supra* note 3, at 793-95; see also Baker & Yoder, *ICSID Arbitration and the U.S. Multinational Corporation*, 5 J. INT'L ARB. 81, 81 (1988).

7. Delaume, *ICSID Arbitration and the Courts*, 77 AM. J. INT'L L. 784, 790-91 (1983).

disputes between developing countries and foreign investors has been a long-standing impediment to the flow of private capital into the developing countries. . . .<sup>8</sup> Historically, the settlement of these disputes has been fraught with difficulties, the most significant of which is the inability of the investor to control court access. An investor seeking redress from the host government is at the mercy of that government.<sup>9</sup> An investor may resort to local remedies, the availability of which is determined by the host government. If local remedies are unavailable, the investor may seek protection from his own government if it will entertain the claim. The resolution of these disputes, in either domestic or international courts, however, depends upon the host government's willingness to submit to a court's jurisdiction. Accordingly, the investor has little guarantee of court access.<sup>10</sup>

Even if access to a court can be obtained, several obstacles to consistent adjudication remain. First, traditional conflict of laws problems, both procedural and substantive, must be addressed.<sup>11</sup> Also, the different legal systems used by various countries may create contrary results in a given case.<sup>12</sup> The differences, for example, between English common law and Napoleonic civil law are quite significant. While the common law system is a precedent-oriented legal system utilizing development of legal concepts through a logical progression of cases, the civil law system relies heavily on statutes with less emphasis on cases and little use of precedent. Another potential obstacle to consistent adjudication is the sophistication of the adjudicator, whether a judge, a jury, or both. Because investment cases often involve complex commercial contracts, an inaccurate or even inconsistent finding of fact or application of law may result if the adjudicator is not a specialist in the disputed subject matter.<sup>13</sup> Additionally, the investor may risk prejudice if local courts are utilized.<sup>14</sup> Finally, the parties must weigh the traditional problems of court congestion and delay in deciding whether to utilize the courts. Because of the foregoing factors, the results of adjudicating the same dispute may vary from country to country. Thus, national courts are not always an appropriate dispute resolution alternative.

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8. Boskey & Sella, *Settling Investment Disputes*, 2 FUND & BANK REV.—FIN. & DEV. 129 (1965).

9. Amerasinghe, *supra* note 3, at 795.

10. *Id.*

11. Chong Su Yun, *The Convention on the Settlement of Investment Disputes — Commentary and Forecast*, 11 MALAYA L. REV. 287, 289 (1969).

12. *Id.* at 289; *see also infra* note 12, at 9-10.

13. *Supra* note 11, at 289.

14. *Id.*

For many years, organizations such as the American Arbitration Association have been settling investment disputes between private parties by using arbitration and conciliation. Difficulties in settling commercial disputes by arbitration associations have been identified,<sup>15</sup> however, and even the International Court of Justice has not had a particularly outstanding record in handling complex commercial disputes.<sup>16</sup>

Furthermore, arbitration procedures have not been widely adopted by nations in the Western Hemisphere because of concerns regarding the enforceability of arbitral awards.<sup>17</sup> For example, while the Montevideo Treaty of International Procedural Law of 1888 included a statement that gave "the same force to judgments or decisions by arbitration in the territory of others that they have in the issuing country,"<sup>18</sup> this treaty was ratified in only four countries.<sup>19</sup> After World War I, the League of Nations and the International Chamber of Commerce worked together to foster an international effort culminating with two additional multilateral treaties dealing with arbitration, the Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Awards of 1927.<sup>20</sup> The Seventh International Conference of American States adopted a resolution to create a multinational agency for the establishment of an inter-American system of arbitration.<sup>21</sup> This resolution led to the development of the Inter-American Commercial Arbitration Commission (IACAC) in 1934 under the guidance of the American Arbitration Association.<sup>22</sup> The inability of IACAC to enforce its decisions, however, has been a major impediment to the Commission's development.<sup>23</sup>

In order to overcome the inadequate enforcement of these treaties, especially the Geneva Convention, the International Chamber of Commerce and the United Nations Economic and Social Council (ECOSOC) took measures which ultimately resulted in the United Nations Conference on International Commercial Arbitration in New York in 1958.

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15. Nussbaum, *The Arbitration Between The Lena Goldfields, LTD. and the Soviet Government*, 36 CORNELL L.Q. 31 (1950).

16. Spofford, *Third Party Judgment and International Economic Transactions*, 113 RECUEIL DES COURS 117, 149-50 (No. III, 1964).

17. Szasz, *Arbitration Under the Auspices of the World Bank*, 3 INT'L LAW 312, 315 (1969).

18. *International Arbitration*, 14 WORLD BUS. 9, 10 (1969).

19. *Id.*

20. Richard, *Enforcement of Foreign Arbitral Awards Under the United National Convention of 1958: A Survey of Recent Federal Case Law*, 11 MD. J. INT'L L. & TRADE 13, 14-15 (1987).

21. *Supra* note 18.

22. *Id.*

23. *Id.* at 10-11.

This conference adopted the Convention on Recognition and Enforcement of Foreign Arbitral Awards of 1958 (hereinafter the New York Convention of 1958), which represented a major improvement in international commercial arbitration. Subsequent to the framing of this convention, Latin American nations, through the Inter-American Juridical Committee, prepared a draft convention on International Commercial Arbitration in 1967. Further work on this draft culminated in 1975 with the Inter-American Convention on International Commercial Arbitration at the Inter-American Specialized Conference on Private International Law in Panama. This Convention (hereinafter the Inter-American Convention of 1975) adopted and combined parts of both the Juridical Committee's 1967 Draft Convention and the New York Convention of 1958.<sup>24</sup> These conventions cover both the enforcement of the arbitral agreement and the arbitral award itself.

Both Conventions, particularly the New York Convention of 1958, require that disputes should be submitted to arbitration rather than to the courts. In addition, once any award is made, it is enforceable by the courts of the countries which have adopted these Conventions. As of November 1988, 79 countries had ratified or acceded to the New York Convention,<sup>25</sup> while as of 1985, nine had ratified the Inter-American Convention.<sup>26</sup> Sixteen countries have ratified one but not the other of the Conventions<sup>27</sup> and eight countries have ratified neither.<sup>28</sup> These eight countries are Argentina, Barbados, Brazil, Bolivia, Canada, the Dominican Republic, Jamaica, and Nicaragua.<sup>29</sup> The United States finally ratified the New York Convention of 1958 in 1970 and, since that time, several cases have implemented the Convention provisions to enforce arbitral agreements and awards.<sup>30</sup> The shortcoming of these Conventions, however, is that they do not apply to arbitration of disputes where one of the parties is a state government.

### III. ICSID

In light of these drawbacks to foreign investment dispute settlement, as well as the need for encouraging foreign investment in LDCs, the

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24. Nattier, *International Commercial Arbitration in Latin America: Enforcement of Arbitral Agreements and Awards*, 21 TEX. INT'L L.J. 397, 402-05 (1986).

25. See *Membership*, ICSID, 21ST ANN. REP. 6 (1988).

26. *Id.*

27. *Id.*

28. *Id.*

29. *Supra* note 24, at 405; NEWS FROM ICSID, Winter 1989, at 7.

30. *Supra* note 20, at 15.

Board of Governors of the World Bank initiated a study in 1962 to determine the feasibility of establishing an institution designed to facilitate the settlement of international disputes through conciliation or arbitration. It was believed that such an agency could foster increased international investment for development projects.<sup>31</sup>

ICSID was subsequently created by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (Convention), which was submitted for country member ratification in March 1965, and which became effective in October 1966. Signatory members of ICSID are required to be members of the World Bank. As of March 3, 1989, a total of 97 World Bank member nations had signed the Convention and 91 of these had deposited ratified instruments with ICSID.<sup>32</sup> The most recent signatories were Belize, Hungary, and Turkey.<sup>33</sup> Table 1 provides a list of current ICSID members.

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31. Report of the Executive Directors of the International Bank for Reconstruction and Development on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, *reprinted in* 4 I.L.M. 524, ¶12 (1965) [hereinafter Report of the Executive Directors].

32. Annual Meeting of the Administrative Council of the International Centre for Settlement of Investment Disputes, TWENTY-FIRST PROCEEDINGS OF THE ICSID ADMINISTRATIVE COUNCIL 1 (1988) [hereinafter Annual Meeting, 21ST PRO. OF ICSID ADMIN. COUN.]; NEWS FROM ICSID, Winter 1989, at 2.

33. *Membership*, INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES, TWENTIETH ANNUAL REPORT 6 (1987) [hereinafter ICSID, 20TH ANN. REP.].

TABLE 1<sup>34</sup>

List of Contracting States and Convention Signatories  
 (\*States which have ratified the Convention but which have not yet  
 deposited instruments of ratification)

Afghanistan	Luxembourg
Australia*	Madagascar
Austria	Malawi
Bangladesh	Malaysia
Barbados	Mali
Belgium	Mauritania
Belize*	Mauritius
Benin, Peoples' Republic of	Morocco
Botswana	Nepal
Burkina Faso	Netherlands
Burundi	New Zealand
Cameroon	Niger
Central African Republic	Nigeria
Chad	Norway
Comoros	Pakistan
Congo, People's Republic of the	Papua New Guinea
Costa Rica*	Paraguay
Cote d'Ivoire	Philippines
Cyprus	Portugal
Denmark	Romania
Ecuador	Rwanda

34. *List of Contracting States and Signatories of the Convention* (as of June 30, 1988), ICSID, 21ST ANN. REP. 6 (1988) [hereinafter *Contracting States*]; NEWS FROM ICSID, Winter 1989, at 2. The following is a regional breakdown of contracting states:

Africa - People's Republic of Benin, Botswana, Burkina Faso, Burundi, Cameroon, Central African Republic, Chad, Comoros, People's Republic of the Congo, Cote d'Ivoire, Gabon, The Gambia, Ghana, Guinea, Kenya, Lesotho, Liberia, Madagascar, Malawi, Mali, Mauritania, Mauritius, Morocco, Niger, Nigeria, Rwanda, Senegal, Seychelles, Sierra Leone, Somalia, Sudan, Swaziland, Togo, Tunisia, Uganda, Zaire, Zambia;

Asia - Afghanistan, Bangladesh, Japan, Republic of Korea, Nepal, Pakistan, Sri Lanka; Western Europe - Austria, Belgium, Denmark, Finland, France, Federal Republic of Germany, Greece, Iceland, Ireland, Italy, Luxembourg, Netherlands, Norway, Portugal, Sweden, Switzerland, United Kingdom of Great Britain and Northern Ireland;

Eastern Europe - Hungary, Romania, Yugoslavia;

Southern Pacific - Fiji, Indonesia, Malaysia, New Zealand, Papua New Guinea, Philippines, Singapore, Solomon Islands, Western Samoa;

North America - United States of America;

Central America & Caribbean - Barbados, El Salvador, Jamaica, St. Lucia, Trinidad and Tobago;

South America - Ecuador, Guyana, Paraguay; and

Middle East - Arab Republic of Egypt, Cyprus, Israel, Jordan, Kuwait, Saudi Arabia, United Arab Emirates.

Egypt, Arab Republic of	Saudi Arabia
El Salvador	Senegal
Ethiopia*	Seychelles
Fiji	Sierra Leone
Finland	Singapore
France	Solomon Islands
Gabon	Somalia
Gambia, The	Sri Lanka
Germany, Federal Republic of	St. Lucia
Ghana	Sudan
Greece	Swaziland
Guinea	Sweden
Guyana	Switzerland
Haiti*	Thailand*
Honduras	Togo
Hungary	Trinidad and Tobago
Iceland	Tunisia
Indonesia	Turkey
Ireland	Uganda
Israel	United Arab Emirates
Italy	United Kingdom of
Jamaica	Great Britain and
Japan	Northern Ireland
Jordan	United States of
Kenya	America
Korea, Republic of	Western Samoa
Kuwait	Yugoslavia
Lesotho	Zaire
Liberia	Zambia

#### A. ICSID Procedures

ICSID facilitates the arbitration or conciliation<sup>35</sup> of investment disputes between foreign investors from states that are ICSID Convention signatories and host state governments that are also Convention signatories. If such a dispute arises and the parties agree to submit to ICSID's

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35. Boskey & Sella, *supra* note 8, at 133. In conciliation, as the term is used for ICSID purposes, a commission of conciliators listens to the parties, clarifies issues, encourages agreement between the parties, and renders nonbinding recommendations. In arbitration, an arbitral tribunal hears the dispute and makes a binding, legally enforceable decision.



jurisdiction, both parties are required to accept the award granted by the ICSID process.<sup>36</sup>

The process begins with the formation of either an arbitration panel or a conciliation committee, each consisting of at least three members.<sup>37</sup> After deciding whether to form an arbitration panel or a conciliation committee, depending on the facts of the case, each party to the dispute may choose one name from a list of individuals compiled and maintained by ICSID. The individuals on the list are prominent in business or are legal experts on negotiation. A third arbitrator (known as the President of the Tribunal) or conciliator (known as the Chairman of the Commission) is appointed with the agreement of the parties or by the two party-selected arbitrators. ICSID then facilitates the process by arranging meetings and travel for these panels or committees. The panel members examine the evidence in their assigned case and decide upon an award to one of the parties in an arbitration proceeding.<sup>38</sup> If the dispute is presented to a conciliation committee, the committee merely makes a recommendation to the parties.<sup>39</sup>

In practice, the individuals who serve on ICSID arbitration panels or conciliation committees are generally lawyers who specialize in international law and who usually have a different nationality than the parties involved in the dispute.<sup>40</sup> Many panelists have occupied prominent positions in their respective governments at the time of, or prior to, their appointment. One panelist was a former judge of the International Court of Justice and several have been distinguished law professors.

In almost all cases, arbitrators and conciliators selected by both the claimants and the defendants have been nationals of industrialized countries. The 67 appointees to ICSID arbitration and conciliation cases have represented the major geographical regions of the world, including most legal systems. Table 2 details the geographical origin of the ICSID arbitrators and conciliators.<sup>41</sup>

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36. Report of Executive Directors, *supra* note 31, at ¶ 32.

37. ICSID Convention, *supra* note 1, at art. 37.

38. *Id.* at art. 48.

39. See INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES, NINETEENTH ANNUAL REPORT 8-9 (1986); *Introduction by the Secretary-General*, ICSID, 20TH ANN. REP. 4-5 (1987).

40. ICSID Convention, *supra* note 1, at art. 13.

41. NEWS FROM ICSID, Spring 1987, at 7; NEWS FROM ICSID, Winter 1989, at 3.

TABLE 2  
Geographical Origin of ICSID Arbitrators

<u>Europe</u>		<u>North America</u>	
Austria	2	Canada	2
Belgium	1	USA	6
Czechoslovakia	1	Total	8
Denmark	6		
FR Germany	1		
France	5	<u>Latin American and the</u>	
Great Britain	1	<u>Caribbean</u>	
Italy	2	Jamaica	1
Netherlands	6	Mexico	1
Portugal	1	Uruguay	3
Spain	2	Total	5
Sweden	2		
Switzerland	7		
United Kingdom	5	<u>Asia</u>	
Total	42	Iran	4
		Philippines	1
		Thailand	1
		Total	6
<u>Africa</u>			
Madagascar	1		
Egypt	2		
Senegal	2		
Sudan	1		
Total	6		

### B. *Jurisdiction*

In order for the Convention to be ratified by Contracting States, the question of jurisdiction had to be narrowly defined. A narrow definition of jurisdiction is critical, because the Convention is designed to fill a particular gap in the available facilities for settling investment disputes. Therefore, jurisdiction is initially limited to legal disputes arising out of an investment.<sup>42</sup> Mere differences of opinion or conflicts of interest are outside the jurisdiction of ICSID.<sup>43</sup> Jurisdiction is further limited to the settlement of investment disputes between a Contracting State, i.e., a

42. ICSID Convention, *supra* note 1, at art. 25(1).

43. *Id.*

country which had ratified the Convention, and a national of another Contracting State.<sup>44</sup> The national of another Contracting State can be an individual, a group of individuals in concert, or a firm. Moreover, ICSID specifically lacks jurisdiction when an investment dispute involves two Contracting States, which instead are required to use the International Court of Justice or the Permanent Court of Arbitration.

ICSID performs other services in addition to the facilitation of arbitration or conciliation of investment disputes. For example, it makes available model clauses formulated for insertion into contracts between foreign investors and Contracting State governments.<sup>45</sup> These model clauses include both (1) bilateral investment contract provisions for dispute submission to ICSID and (2) provisions which might be included in bilateral treaties designed to encourage investments by one party in the territory of another.<sup>46</sup> ICSID also compiles investment laws from more than 55 developing nations.<sup>47</sup> These compilations have been published in looseleaf form and consist of constitutional, legislative, regulatory, and treaty materials that deal with agreements affecting foreign investment.<sup>48</sup> ICSID has thus developed into an important source of systematic information on foreign investment law.

In addition, ICSID promotes bilateral treaties between signatory states. Examples of this service were the treaties negotiated between Indonesia and Belgium, between Indonesia and France, and between Tunisia and France, which were all designed to be bilateral treaties for the protection and promotion of foreign investment between the parties to each treaty.<sup>49</sup> In addition, ICSID encourages host countries to formulate foreign investment laws that initiate ICSID jurisdiction in foreign investment disputes eligible for the ICSID process. This encouragement is necessary because the Convention does not bind signatory parties to dispute settlement by ICSID's procedures. The parties, although Convention signatories, may limit cases heard by ICSID or even decline to submit to ICSID's jurisdiction altogether.<sup>50</sup>

The most recent addition to ICSID's various services focuses on the education and dissemination of foreign investment literature. ICSID promotes conferences and colloquia on international arbitration and pub-

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44. *Id.*

45. See INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES, FOURTH ANNUAL REPORT 4 (1971).

46. NEWS FROM ICSID, Winter 1987, at 6.

47. *Id.*

48. INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES, SEVENTH ANNUAL REPORT 5 (1974).

49. *Id.*

50. ICSID: *What it is, What it does, How it works*, ICSID Brochure, July 1, 1968.

lishes a journal, entitled *ICSID Review—Foreign Investment Law*, which is the first periodical devoted to foreign investment law.<sup>51</sup>

According to the Winter 1989 issue of *News from ICSID*, twenty-six cases have been submitted for arbitration or conciliation since the establishment of ICSID in 1966. More than half of these cases have been submitted since 1981, and all but one of the twenty-six case requests were submitted by investors.<sup>52</sup> Ten cases are still pending in arbitration, conciliation, or annulment proceedings.<sup>53</sup> The procedures outlined in Article 52 of the Convention state that either party may request an annulment of any part or all of the award. Of the ten arbitral awards granted by ICSID, only two have been annulled.<sup>54</sup>

Despite the fact that ICSID encourages the flow of foreign direct investment to LDCs, it remains a rather obscure international agency. Past studies have found that top executives in U.S. multinational companies (MNCs), including vice-presidents of international operations, chief financial officers, and international legal counsel, are not very familiar with ICSID and its facilities.<sup>55</sup> These studies have also found that the same MNCs seldom utilize ICSID services.<sup>56</sup>

#### IV. LACK OF FAMILIARIZATION OR UTILIZATION OF ICSID

The lack of familiarity with and utility of ICSID services by U.S. MNCs is a result of several reasons. First, jurisdiction represents a problem. ICSID's narrow jurisdictional scope limits its usefulness because most international business contract disputes arise between private foreign investors and private individuals or companies located in the host state. These disputes are handled by other means, as previously discussed in this Article.<sup>57</sup> On the other hand, foreign direct investment has been increasing at a rapid rate during the past several years, and it might be inferred that this growth has led to the consummation of an increasing number of foreign direct investment projects involving contracts between private foreign investors and host state governments. For example, Baker and Ryans conducted research and concluded that many petroleum companies are required to operate in this manner, and it was these compa-

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51. *Publications*, ICSID, 21ST ANN. REP. 10 (1988).

52. *Introduction by the Secretary-General*, ICSID, 21ST ANN. REP. 4 (1988).

53. *Disputes before the Centre*, *id.* at 6-7; *NEWS FROM ICSID*, Winter 1989, at 2.

54. ICSID Convention, *supra* note 1, at art. 52.

55. Baker & Ryans, *A Solution to Foreign Contract Investment Disputes*, 10 J. WORLD TRADE L. 65, 71 (1976); Baker, *ICSID: An International Method for Handling Foreign Investment Disputes in LDC's*, FOREIGN TRADE REV. 411, 411-21 (Jan.-Mar. 1987).

56. *Id.*

57. *Id.*

nies that were found by Baker and Ryans to be the most familiar with ICSID.<sup>58</sup>

Many respondents in the studies by Baker and Ryans<sup>59</sup> and by Baker<sup>60</sup> cited the paucity of case materials as a second reason for their lack of familiarity with or utilization of ICSID. U.S. MNC officials' own confusion after their evaluation of ICSID may be attributed to the small number of cases decided by the ICSID procedures.<sup>61</sup> None of the chief financial officers of U.S. MNCs responding to the Baker study believed the Convention favors the foreign investor,<sup>62</sup> even though the few awards made have been in favor of the foreign investor.<sup>63</sup> The problem of lack of case materials is perpetuated by the inability of ICSID to publish case results without the consent of both parties.<sup>64</sup> ICSID would like to begin publishing case results in the next edition of its publication, *ICSID Cases*.<sup>65</sup> The parties to settled disputes, however, have not had the opportunity to consent to such publication,<sup>66</sup> and their consent is required before publication, even though dissemination of case results would be worthwhile to investors planning projects in LDCs.

A third problem, often cited by international dispute settlement organizations, is the lack of enforcement of ICSID rules, regulations, and findings.<sup>67</sup> In one case, for instance, the contracting host state government has declined to pay its full share of the expenses of the proceeding.<sup>68</sup> In addition, this state has not complied with the award rendered.<sup>69</sup> Identification of this state has not been made public pursuant to ICSID procedures.<sup>70</sup> If this nonadherence to rules, regulations, and awards is allowed to continue, both the state government which fails to comply and the entire ICSID arbitration procedure will lose credibility.

Investors who are considering using ICSID's facilities are also concerned about the ease with which a party may withdraw from an ICSID

58. Baker & Ryans, *ICSID, A Little Known Solution to Investment Disputes in High Risk Countries*, 6 AKRON BUS. & ECON. REV. 8, 12 (Fall 1975).

59. Baker & Ryans, *supra* note 55, at 71.

60. Baker, *supra* note 55, at 411-21.

61. *Id.*

62. *Id.*

63. *Id.* at 411-21.

64. Annual Meeting, 21ST PRO. OF ICSID ADMIN. COUN., *supra* note 32, at Attachment.

65. *Id.*

66. *Id.*

67. Szasz, *supra* note 17.

68. Annual Meeting, 21ST PRO. OF ICSID ADMIN. COUN., *supra* note 32, at Attachment.

69. *Id.*

70. *Id.*

proceeding already in progress.<sup>71</sup> In the case of ICSID, the Convention requires that both parties to an arbitration panel or conciliation committee proceeding accept ICSID jurisdiction.<sup>72</sup> In 1977, three cases were submitted to ICSID by aluminum producers with contract disputes involving the Government of Jamaica.<sup>73</sup> Although the parties in these disputes had agreed to accept the jurisdiction of ICSID, Jamaica later unilaterally withdrew from the proceedings after it announced its participation in the establishment of an international bauxite cartel.<sup>74</sup> Technically, the proceedings were discontinued at the request of the foreign investor claimants after an agreement was reached with the respondent which provided a basis for final settlement.<sup>75</sup> Ultimately, the ability of a contracting host state government to withdraw from ICSID proceedings in this manner will reduce the credibility of ICSID's procedures and facilities.

The fourth reason for the lack of ICSID familiarity, as identified by respondents to both the Baker and Ryans studies and the Baker study,<sup>76</sup> is the lack of adequate information concerning ICSID's operations.<sup>77</sup> Only eleven percent of the chief financial officers in the Baker study believed they had been provided adequate information about the Convention and/or ICSID.<sup>78</sup> A similar finding was reported in the Baker & Ryans study in which seventeen of the thirty-five firms who in fact have one or more corporate-host government agreements felt they had adequate information about ICSID.<sup>79</sup> In contrast, various articles on different aspects of ICSID have appeared in several law journals.<sup>80</sup> ICSID

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71. Annual Meeting, 21ST PRO. OF ICSID ADMIN. COUN., *supra* note 32.

72. ICSID Convention, *supra* note 1, at art. 25(1).

73. For an indepth analysis of this case, see Schmidt, *Arbitration Under the Auspices of the International Centre for Settlement of Investment Disputes (ICSID): Implications of the Decision on Jurisdiction in Alcoa Minerals of Jamaica, Inc. v. Government of Jamaica*, 17 HARV. INT'L L.J. 90 (1976).

74. Kaiser Bauxite Company v. Government of Jamaica, Case ARB/74/3; Reynolds Jamaica Mines, Ltd. and Reynolds Metals Company v. Government of Jamaica, Case ARB/74/4.

75. *Id.*

76. Baker & Ryans, *supra* note 55, at 71.

77. *Id.* at 75.

78. Baker, *supra* note 55, at 419.

79. Baker & Ryans, *supra* note 55, at 73-75.

80. See generally Boskey & Sella, *Settling Investment Disputes*, 2 FIN. & DEV. 129-34 (1965); Broches, *Awards Rendered Pursuant to the ICSID Convention: Binding Force, Finality, Recognition, Enforcement, Execution*, 2 ICSID REV.-FOREIGN INV. L.J. 287-334 (1987); Broches, *Development of International Law by the International Bank for Reconstruction and Development*, PROCEEDINGS OF ASIL 33-38 (1965); Broches, *Settling International Investment Disputes*, 119 THE BANKER No. 516, 140-46 (1969); Delaume, *Convention on the Settlement of Investment Disputes Between States and Nationals of Other States*, 1 INT'L LAW. 46-80 (Oct. 1966); Fiedland, *Provisional Measures and ICSID Arbitration*, 2 ARB. INT'L 335-57 (1986); Hynning, *The World Bank's Plan for the Settlement*

itself issues a number of publications, including a semiannual newsletter (*News from ICSID*), a journal (*ICSID Review-Foreign Investment Law Journal*), an annual report, a report of the annual meeting of the ICSID Administrative Council, a monograph entitled *ICSID Cases: 1972-1987*, which is periodically revised, and miscellaneous pamphlets. Thus, it appears that few international organizations have received more analyses and publicity than ICSID.

A final problem, and the focus of this Article, is that membership in ICSID has been cited as a deterrent to its utilization. Before 1979, ICSID's membership showed limited geographic diversification, especially since the Arab World and Latin America were absent.<sup>81</sup> Since 1979, Kuwait, Saudia Arabia, and the United Arab Emirates have signed the Convention.<sup>82</sup> However, Latin America remains a problem. Although Belize became the twelfth ICSID member country from Latin America during fiscal 1987, Latin American countries represent only a handful of Caribbean and Central American nations as Convention signatories, and only two South American countries, Ecuador and Paraguay, have become ICSID members.<sup>83</sup> Until more nations become signatories of the Convention, ICSID will remain quite ineffective in Latin America.<sup>84</sup>

A major problem, especially in Latin America, in the development of the use of ICSID, or any other type of international arbitration, stems from the widespread adoption of the Calvo doctrine of law by Latin American nations.<sup>85</sup> Latin American investment contracts generally contain a "Calvo clause," which follows the Calvo doctrine<sup>86</sup> requiring exhaustion of local legal remedies for resolving contract disputes before a

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of *International Disputes*, 51 A.B.A. J. 558-63 (1965); O'Hare, *The Convention on the Settlement of International Disputes*, 6 STAN. J. INT'L STUD. 146-62 (1971); Paulsson, *The ICSID Klockner v. Cameroon Award: The Duties of Partners in North-South Economic Development Agreements*, 1 J. INT'L ARB. 145 (1984); Redfern, *ICSID - Losing its Appeal?* 3 ARB. INT'L 98-118 (1987); Rodley, *Some Aspects of the World Bank Convention on the Settlement of Investment Disputes*, 4 CAN. Y.B. INT'L L. 43-63 (1966); Sassoon, *The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States*, 1 ISRAEL L.R. No. 1, 27-39 (1966); Sirefman, *The World Bank Plan for Investment Dispute Arbitration*, 20 ARB J. 168-78 (1965); Szasz, *Using the New International Centre for Settlement of Investment Disputes*, 7 E. AFR. L.J. 128-41 (1971); Tupman, *Case Studies in the Jurisdiction of the International Centre for Settlement of Investment Disputes*, 35 INT'L & COMP. L.Q. 813-38 (1986); van den Berg, *Some Recent Problems in the Practice of Enforcement Under the New York and ICSID Conventions*, 2 ICSID REV.-FOREIGN INV. L.J. 439-56 (1987).

81. *Contracting States*, *supra* note 34 and accompanying text.

82. *Id.*

83. *Id.*; see Bakcr & Ryans, *supra* note 55, at 72.

84. Szasz, *The Investment Disputes Convention and Latin America*, 11 VA. J. INT'L L. 256, 256-65 (1971).

85. *Id.* at 260-61.

86. M. SORENSON, *MANUAL OF PUBLIC INTERNATIONAL LAW* 590-93 (1968).

foreign investor can resort to his own court system or to an international agency.<sup>87</sup> The adoption of ICSID procedures in Latin American countries has developed very slowly, and will continue to develop slowly so long as the Calvo doctrine continues to be a part of their dispute resolution practices.

## V. THE CALVO DOCTRINE AND CALVO CLAUSES

During the 1800's, Latin American countries experienced diplomatic and military intervention by foreign investors which ultimately created the protectionist attitudes toward international law that Latin American countries possess today.<sup>88</sup> Of particular disdain to these countries were the abuses that occurred as a result of protection measures afforded aliens under international law.<sup>89</sup> In an effort to eliminate diplomatic protection of foreign citizens in Latin American countries, and to replace this protection with equal legal treatment of both nationals and aliens in a state, many Latin American countries adopted the Calvo doctrine of law, named for the Argentinian diplomat and jurist, Carlos Calvo.<sup>90</sup> The view that "it is certain that aliens who establish themselves in a country have the same rights to protection as nationals, but they ought not to lay claim to a protection more extended"<sup>91</sup> was expressed in an 1896 treatise by Calvo, who lived from 1824 to 1906. Calvo felt that recognition of the international law concept would result in allowing "an exorbitant and fatal privilege, especially favourable to the powerful states and injurious to the weaker nations, establishing an unjustifiable inequality between nationals and foreigners."<sup>92</sup> In addition, Calvo maintained that recognition of the international standard would contradict the fundamental concept of territorial sovereignty championed by independent nations.<sup>93</sup>

Several international documents which recognize the Calvo doctrine include the following:

- 1) the Treaty of Commerce and Navigation entered into by Latin American States at the second Lima Congress (1864-65);
- 2) the First International Conference on American States (held in Washington, D.C. 1889-90); and

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87. J. SIMPSON & H. FOX, *INTERNATIONAL ARBITRATION LAW AND PRACTICE* 118 n.17 (1959).

88. H. STEINER & D. VAGTS, *TRANSITIONAL LEGAL PROBLEMS* 522 (2d. ed. 1976).

89. *Id.*

90. *Id.*

91. C. CALVO, *LE DROIT INTERNATIONAL THEORIQUE ET PRACTIQUE* 231 (5th ed. 1986).

92. *Id.*

93. *Id.* at vol. 3, 142.



3) the Seventh Conference of American States (held in Montevideo in 1933).<sup>94</sup>

While the Calvo doctrine was aimed at preventing abuses from invocations of diplomatic protection, it did not prohibit all international claims available to aliens.<sup>95</sup> To fill this gap and to complement this doctrine, the Calvo clause developed as part of many Latin American contracts. By including a Calvo clause in a contract, all chances of diplomatic intervention are eliminated, and the alien is truly on an equal legal stance with the national. Basically, by agreeing to include a Calvo clause in a contract, the alien contracting party agrees to waive all rights to diplomatic protection afforded him by his own country under international law. In the event of a contractual dispute, therefore, the alien contracting party can resort only to the legal remedies available in the forum state.

The existence of a Calvo clause in a contract can take several forms. It can exist as an express agreement in the contract, or it can be deemed to be an implied contract term in those states which have included Calvo clauses in their constitutions or statutes.<sup>96</sup> Articles 30 and 31 of the Ecuadorian law of February 16, 1938, are illustrations of such provisions:

*Article 30.* Contracts concluded between the Ecuadorian Government and foreign persons, either individuals or firms of any kind, are subject to the laws of Ecuador, and the rights and obligations deriving from said contracts will be subject to the exclusive jurisdiction of the national judges and courts.

*Article 31.* The renunciation of diplomatic claims will be an implicit and essential condition of all contracts concluded by foreigners with the state, or of all contracts obligating the state or individuals to foreigners, or of all contracts whose effects should be felt in Ecuador.<sup>97</sup>

Hence, in countries adopting the Calvo doctrine, it is possible to be subject to the ramifications of a Calvo clause in a contractual dispute even where the contracting parties themselves did not expressly include such a provision in their agreement.

#### A. *Validity and Enforceability*

The validity and enforceability of Calvo clauses in international transactions has created much debate with conflicting results. Courts interpreting Calvo clauses have set out the general theme that each case in-

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94. F. GARCIA-AMADOR, *ENCYCLOPEDIA OF INTERNATIONAL LAW* 62 (1985).

95. *Id.*

96. *Id.*

97. *Id.* at 63.

volving the application of a Calvo clause must be considered and decided on its own merits.<sup>98</sup> In the landmark 1926 case of *North American Dredging Co. of Texas v. United Mexican States*,<sup>99</sup> decided by the United States-Mexican Claims Commission, the Commission upheld the validity of a Calvo clause contained in a contract between the Mexican government and a United States corporation.<sup>100</sup> This decision, however, did not make all Calvo clauses valid under all circumstances. The Commission's decision in *North American Dredging Co.* reasoned that alternative international remedies will remain available to an alien because to do otherwise would constitute a "denial of justice."<sup>101</sup> Subsequent decisions by the Commission stated that to constitute a denial of justice, the interest involved would have to be substantial and the conduct of the state grave.<sup>102</sup> While many decisions have upheld Calvo clauses, other decisions have held Calvo clauses to be an ineffective bar to alternative international tribunals when the clause's language was too vague to determine the intent of the contracting parties, and where the government itself annulled the contract.<sup>103</sup> Although there have been no significant international arbitrations involving the Calvo clause since the 1930's, and although the significance of the Calvo doctrine has been minimized as a result of the globalization of economies and the international recognition of the equality of human rights, many Latin American countries continue to follow the Calvo legal doctrine and to subject their investment contracts to these clauses.<sup>104</sup> Hence, foreigners interested in entering into investment contracts in countries that utilize Calvo clauses must weigh the effects this legal doctrine will have on their ability to enforce such contracts.

#### B. ICSID and the Calvo Clause

It is apparent that so long as Latin American countries continue to include Calvo clauses in their investment contracts, these countries will not become ICSID signatories.<sup>105</sup> The very purpose of ICSID, to provide

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98. J. SIMPSON & H. FOX, *supra* note 87, at 118.

99. *North American Dredging Co. of Texas v. United Mexican States*, 4 R. Int'l Arb. Awards 21, 26 (1926).

100. *Id.*

101. *Id.*

102. INTER-OCEANIC RAILWAY CO. ARBITRATION, 6 Annual Digest 199 (1931-32); *Elo Mining And Railroad Co.*, 5 R. INT'L ARB. AWARDS 91 (1952).

103. J. SIMPSON & H. FOX, *supra* note 87, at 122.

104. For a survey of countries affected, see D. SHEA, THE CALVO CLAUSE, A PROBLEM OF INTER-AMERICAN AND INTERNATIONAL LAW AND DIPLOMACY 269-81 (1955).

105. *Contracting States*, *supra* note 34, at 14-15.

a neutral international dispute resolution vehicle for contracts involving foreign investors and host state governments, is in direct conflict with Calvo clauses, which disallow alternative international forums for resolving contract disputes with aliens. In countries that utilize Calvo clauses, foreign investors can only pursue remedies of the host state government.<sup>106</sup> Foreign investors are not only reluctant to use local courts for fear of prejudice and lack of control, but also because the likelihood of being able to use ICSID or other types of international arbitration is slim as a result of the Calvo doctrine prerequisites.

Generally, the effect of a Calvo clause "to deprive an international tribunal of jurisdiction depends partly on the terms of the clause, partly on the treaty establishing the tribunal, and partly on the basis upon which the claim is presented to the tribunal."<sup>107</sup> The Calvo clause, however, has not been held void, although tribunals have tried to limit its scope and effect.<sup>108</sup> Ironically, ICSID itself recognizes the Calvo clause concept by inclusion of a version of a Calvo clause in Article 27 of the Convention of Investment Disputes which reads as follows:

- (1) No Contracting State shall give diplomatic protection, or bring an international claim, in respect of a dispute which one of its nationals and another Contracting State shall have consented to submit or shall have submitted to arbitration under this Convention, unless such other Contracting State shall have failed to abide by and comply with the award rendered in such dispute.
- (2) Diplomatic protection, for purposes of paragraph (1), shall not include informal diplomatic exchanges for the sole purpose of facilitating a settlement of the dispute.<sup>109</sup>

Inclusion of Article 27 in the Convention requires resolution of disputes submitted to ICSID to be determined entirely by ICSID to the exclusion of any other diplomatic protection otherwise available to the contracting parties.<sup>110</sup> Consequently, the members of ICSID who submit their contractual disputes for ICSID resolution waive all other rights to diplomatic protection in their own state. Moreover, because contracts with Latin American countries also contain a Calvo clause restricting resolution of contractual disputes exclusively to the local remedies available in the host state, and not to any international alternatives, the co-existence of these two Calvo clauses are in direct conflict. Compliance with both Calvo clauses by Latin American countries becomes impossible.

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106. J. SIMPSON & H. FOX, *supra* note 87, at 117.

107. *Id.* at 118.

108. *Id.*

109. ICSID Convention, *supra* note 1, at art. 27(1) & (2).

110. Note, *The International Centre for Settlement of Investment Disputes: Investment Arbitration for the 1990s*, 4 OHIO ST. J. ON DIS. RES. 107, 113 (1988).

In the countries that do not recognize Calvo clauses in their own contracts, the Calvo clause contained in Article 27 of the Convention creates no problem, and they are able to avail themselves of ICSID's attractive benefits. Hence, the express inclusion of Article 27's Calvo clause in the Convention, while presumably there to strengthen ICSID's dispute resolution process, appears to have the indirect, but powerful, contrary effect of restricting ICSID's membership to countries not recognizing Calvo clauses.

## VI. CONCLUSION AND RECOMMENDATIONS

A review of ICSID's creation reveals that one of its primary purposes is to encourage foreign investment in LDCs and NICs by providing a neutral international forum for resolving any contractual disputes arising from these investment ventures. Further review of ICSID's effectiveness reveals that a significant segment of the countries, such as Latin American nations, that could benefit from foreign investment are not members of ICSID and thereby receive none of the available benefits. This is ICSID's major drawback.

While several negative factors, such as the lack of enforcement of ICSID awards, may cause Latin American nations to shy away from ICSID membership, further inquiry reveals that a unique contributing factor is the recognition of the Calvo doctrine of law and the utilization of Calvo clauses by Latin American countries. While ICSID's shortcomings may be a deterrent to any nation joining its membership, a review of Table 1<sup>111</sup> illustrates that ICSID membership by non-Calvo doctrine countries is widespread. Thus, the lack of ICSID membership by such a large geographic segment of nations as Latin America must be attributed to an additional deterrent factor unique to those nonmember countries, such as the Calvo doctrine or Calvo clauses.

The Calvo clause requires aliens, in resolving contractual disputes, to submit such disputes solely to local tribunals for resolution and to thereby waive all rights to alternative remedies available to the alien under international law. Following this concept, countries including Calvo clause provisions in their contracts would not allow investment disputes between foreign investors and host state governments to be resolved by ICSID's provisions. Hence, unless these countries abandon Calvo clauses in their contracts, the likelihood of these countries becoming ICSID signatories appears slight.

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111. *Contracting States*, *supra* note 34, at 14-15.

A historical examination of the Calvo clause indicates that this legal concept has a long tradition in Latin America since its recognition in the late 1800's. Although few disputes have challenged the Calvo clause recently and although international economics and human rights philosophies have changed drastically since the Calvo doctrine was first devised, it seems unlikely that Latin American countries will eliminate this legal concept in the near future.

An ironic twist to this situation is the fact that ICSID itself, in Article 27 to its Convention, has a Calvo clause which requires that disputes submitted to ICSID for resolution be resolved solely through the ICSID process to the exclusion of all alternative remedies available to the parties. While this provision was included to strengthen ICSID's jurisdiction, it has the indirect effect of limiting ICSID membership to countries not following the Calvo doctrine, a doctrine which ICSID itself champions enough to follow.

The failure of Latin American countries to join ICSID remains a problem for ICSID and a disadvantage to these countries, which could greatly benefit from the foreign investment encouraged by ICSID membership. The likelihood for increased membership by Latin American countries would be enhanced if these countries were to abandon Calvo clauses in their contracts. While a few countries have done so, an overall trend in this direction appears unlikely. A second impediment to ICSID membership by Latin American countries is the Calvo clause contained in Article 27 of the Convention. Removal of this provision together with abandonment of Calvo clauses by Latin American countries appears to be the best resolution to this ICSID membership limitation.

